

## THE SPECTRUM OF RESPONSES TO TREATY VIOLATIONS

ALBERT J. ESGAIN\*

### I. INTRODUCTION

This paper considers the various courses of action which may be taken by international organizations or states, either individually or collectively, in response to breaches of international treaties or agreements or of applicable rules of customary international law. It also considers the factors and the circumstances which motivate the espousal of a specific type of response.

An assertion that an act or omission constitutes a breach of a treaty or agreement may simply be an allegation, unverified and unsubstantiated, or it may be one which has been fully substantiated or is supported by the decision of a duly constituted international agency or tribunal. In this respect it is to be noted that particular types of responses to treaty breaches, even those which have been confirmed by adjudication, may be illegal. For these and other reasons pertinent to matters here discussed it is necessary that the terms "response" and "sanctions" be defined.

### II. RESPONSES AND SANCTIONS

A response is any act or omission, whether legal or illegal, and whether of a forcible, coercive, detrimental, or peaceful nature, to which states have recourse, either individually or collectively, to redress a breach, or a threatened breach, of the express or implied provisions of an international agreement or a rule of customary international law.<sup>1</sup>

---

\*Special Consultant to The Judge Advocate General of the Army on Private International Law Matters.

The opinions expressed are those of the author and do not purport to reflect the views of the Department of the Army or of any other Government Agency.

<sup>1</sup> Institute of Defense Analysis for the U.S. Arms Control and Disarmament Agency, Summary Report, Woods Hole Summer Study on Verification and Response in Disarmament Agreements 2-3 n.2 (1962), defines a response for purposes of arms control and disarmament agreements as "any course of action taken by a nation or an international body on the basis of information indicating that another party to an arms control or disarmament agreement is not acting in conformance with objectives contained in or implied by the agreement."

A sanction is any forcible, coercive, or detrimental measure authorized by international law, by which an international body or states, either individually or collectively, seek to deter, to rectify, or to punish another state or group of states for improper or illegal conduct which they fail or refuse to rectify.<sup>2</sup>

A sanction, therefore, is a particular type of response. It is one which is authorized by, and which is taken in support of, international law, either customary or conventional.<sup>3</sup> Responses which are proscribed by international law, including those which may be expressly provided for in particular international agreements, are illegal acts for which sanctions are authorized and may legally be imposed.

As a general rule the purpose of responses and sanctions is to prevent the commission of an illegal act, or to preclude a transgressor from attaining his objective, or to deny a transgressor any advantage or benefit which he has or may obtain from his illegal acts. The primary objectives of responses and sanctions, properly considered, are the suppression of violence, and the insurance of peace and adherence to the orderly process of law.<sup>4</sup> Sanctions are rarely imposed for punitive purposes. In those instances in which punitive sanctions have been imposed they have generally failed to produce the desired results. In some instances they have provided the foundation for lasting and deep-seated resentments as, for

---

<sup>2</sup> "In the original sense of the word, a sanction is a penalty provided as a means of enforcing obedience to a law. In jurisprudence, a law is said to have a sanction when there is a State which will intervene if the law is disobeyed." The Pocket Law Lexicon (8th ed. 1951). Fried states that the word "sanction" is "the name given to penalties applied by, or on behalf of or at the request of, an international organization representing the international community, against a state or group which has violated (or threatens to violate) an international obligation of its own, and especially the obligation to refrain from military aggression," 24 *Encyclopedia Americana, Sanctions, International* 248 (1964 ed.). Mitrany observes that the word sanction "has now passed into general usage for describing collectively the various means prescribed or contemplated for enforcing international covenants. In the English language the word has meant till now merely approval or confirmation. Its new sense . . . is taken from the French, in which language 'sanction' signifies a constrained or coercive measure which prevents or punishes violators and ensures execution." Mitrany, *The Problem of International Sanctions* 1 (1925). A report by a Group of Members of the Royal Institute of International Affairs in 1938 in a study entitled "International Sanctions," concluded that a proper definition of sanctions for international affairs would be "action taken by members of the international community against an infringement, actual or threatened, of the law." *Id.* at 16. Wild defines a treaty sanction as "the threat of a certain measure or measures either in the treaty itself or in international law, which induces conformity to and which tends to prevent the violation of a treaty." Wild, *Sanctions and Treaty Enforcement* 196 (1934).

<sup>3</sup> Royal Institute of International Affairs, *International Sanctions* 4 (1938).

<sup>4</sup> *Id.* at 5, 13.

example, in the case of the sanctions imposed upon Germany by the Versailles Treaty. It is essential, therefore, that any response or sanction which may be imposed be compatible with the Charter of the United Nations and be the minimum necessary to accomplish legitimate peaceful ends.

Article 1, paragraph 1 of the Charter of the United Nations specifies that in the maintenance of international peace and security the United Nations will

take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The preventive and enforcement aspects of the Charter are emphasized and articulated in Article 39 which vests in the Security Council the right to "determine the existence of any threat to the peace, breach of the peace, or act of aggression" and to "decide what measures shall be taken . . . to maintain or restore international peace and security," as provided in Articles 41 and 42 of the Charter.

Responses and sanctions may be considered as the means by which states are induced to comply with their general international obligations as members of the international community, and the specific obligations which they have voluntarily assumed by treaty provision.<sup>5</sup> Conversely, responses and sanctions may be considered as measures the fear of which may deter states from breaching their obligations under international law.

*A. Means by Which States are Induced to Comply with Treaties or are Deterred from Treaty Breaches.*

The means by which states are induced to comply with their international obligations, or may be deterred from breaching them, are conditioned by, and are predicated upon, a number of internal and external factors which are in part both psychological and subjective in nature.

These means include: (1) the fear of war or other forcible measures of reprisal; (2) the fear of nonforcible measures of retaliation, such as embargoes, an international boycott, or the termination of a treaty; (3) fear of such ultimate consequences that what may be gained through a breach of the law may be negated or outweighed by the loss that results from action which may be

---

<sup>5</sup> See Wild, *op. cit. supra* note 2, at 3, 60.

taken by the victim of the breach or by the international community; (4) the fear of the disapprobation of the international community or of a hostile or adverse public opinion, international, domestic, or both; (5) the fear that the victim of the breach may terminate other agreements between them which are beneficial; (6) the fear of establishing a bad international reputation; (7) the fear that other benefits under the agreement which has been breached may be terminated; (8) the fear that a breach may not be condoned or cannot be justified on equitable grounds before the international community; (9) the fear that the breach may preclude the conclusion in the future of other agreements which it desires to negotiate with the victim; (10) the fear that sanctions specified in the treaty may be imposed because of the breach; *e.g.*, forfeiture of property held in escrow to assure compliance; referral of the breach to an arbitral tribunal or to an international court of justice for adjudication; (11) the fear that the nature of the breach makes it one which is a threat to world peace and as such would be subject to action by the Security Council or the General Assembly, and for which military or non-military sanctions could be imposed under the provision of the Charter of the United Nations.<sup>6</sup>

*B. Factors Conditioning the Effectiveness of Inducement or Deterrent Measures.*

The effectiveness of these deterrent factors depends in large measure upon the particular facts and circumstances which exist at the time that a breach is contemplated or accomplished. For example, the comparative strength of the parties concerned and that of their allies, their geographic location, the probability that an effective response will be forthcoming from either the victim of the breach or the international community; the general international political situation and, particularly, the political conditions which exist in the territory of the intended victim; the probability of attaining lasting benefits from the breach; the willingness of the transgressor to assume any and all possible consequences which may result from the breach; the extent to which a breach may be plausibly justified on equitable or other grounds to the international community; the probability that the victim of the breach will absorb the breach to preserve other benefits which he can continue to enjoy under other provisions of the agreements which have not been breached; and the extent to which the victim is determined to preserve the agreement are all germane.

---

<sup>6</sup> See in this respect, Wild, *op. cit. supra* note 2, at 60-61; Ikke, "After Detection—What?" 30 Foreign Affairs 208-13 (1961).

Wild<sup>7</sup> has aptly pointed out that the problem of sanctions as applied to treaty provisions is both legal and political. It is legal in that it relates to the enforcement of a legal obligation. It is political because the efficacy and the continuation of the treaty depend upon the attitude of the contracting parties toward the sanctity of treaties, the doctrine of *rebus sic stantibus*, the revision and termination of treaties, and the settlement of disputes. Responses and sanctions, in addition to their treaty enforcement purpose, are, of course, also intended to perpetuate the *status quo* which existed at the time the treaty was concluded and which, for various reasons, is now no longer considered to be satisfactory or beneficial to certain of the parties. It is possible, therefore, that a treaty which is obsolete or detrimental to the general welfare, or which constitutes a threat to the peace and security of the international community may continue in effect against the will of one of the contracting parties, because of the fear of responses and sanctions. This possibility exists particularly with respect to treaties which make no provision for their revision, renegotiation, or termination, and under which one or more of the parties is unwilling to consent to revision or termination even though considerations of equity might so dictate.

Wild has observed that the *pacta sunt servanda* doctrine espouses the impossible or the impracticable in that it seeks "to dam the stream rather than to canalize it" and tends "inevitably to place a straight-jacket upon the relations of states . . . . The result has been an impossible rigid principle emphasized to the detriment of the international community."<sup>8</sup>

In the absence of a general recognition of the counterbalancing doctrine of *rebus sic stantibus*, the principle of modification, or the existence of an international legislature empowered to correct inequities, it may be said that the doctrine *pacta sunt servanda*, which was designed originally to promote international order and stability, in fact fosters just the opposite—violence on the part of states that seek to unshackle themselves from absolute and detrimental treaty bonds.

This basic problem reflects the need for an international legislature empowered to supervise the making of treaties, to review and revise treaty obligations, to void those that are inequitable, and to control the response and sanctioning procedures. The sanctioning of treaty breaches can only be practical and efficacious when treaty obligations have been given necessary flexibility through interna-

---

<sup>7</sup> Wild, *op. cit. supra* note 2, at 7-8.

<sup>8</sup> *Id.* at 13-16.

tional legislation and judicial development.<sup>9</sup> Sanctions and revisions are closely allied topics: sanctions serve to maintain and enforce order while revisions provide for change. Both are essential to a peaceful and progressive international community.<sup>10</sup>

A world government capable of attaining these results is now only an ideal. Until perfected the resolution of the problem of responses and sanctions will in large measure rest upon the decisions of international tribunals, effective collective enforcement measures, the conclusion of treaties which expressly recognize the need for revision or provide for termination on equitable grounds, and the establishment of international agencies which are empowered to determine with finality issues both legal and political on the basis of justice.

States will comply with treaties only as long as they consider them to be fair and beneficial. Treaties which are not so considered will, as a general rule, be breached regardless of any special sanctioning procedures and the probability of their invocation. When treaties impinge upon national interests, threats and coercion cannot be relied upon to deter their breach.<sup>11</sup> This is evidenced by the failure of the Covenant of the League of Nations and the Briand-Kellogg Pact of 1928 to deter the Germans from breaching the Treaty of Versailles or the Japanese from resorting to forceful measures in Manchuria in the 1930's. Furthermore, the ultimate effectiveness of sanctions is dependent in large part upon the will of the international community. This will, however, is elusive because of the varying interests and aspirations of individual members, their evaluations of the equities which are involved in the breach of a particular treaty obligation, and the probability that the interests of justice will be served through the application of sanctions.

The primary objective of purposeful responses to treaty violations is preservation of the treaty, not coercion or punishment with the attendant risk of war, unless, of course, such forcible sanctioning action is required to protect vital security interests which no lesser response or sanction can preserve. As a general rule, therefore, only resort to non-forcible responses and sanctions appears practical and feasible.

Breaches of international obligations, customary or conventional, may be classed as substantive or procedural, and they may be considered as anticipatory or constructive.

Substantive breaches, generally speaking, are breaches of those provisions of international law which establish rights and benefits.

---

<sup>9</sup> *Id.* at 20-25.

<sup>10</sup> *Id.* at 27.

<sup>11</sup> *Id.* at 210.

They are breaches of the fundamental provisions of international law or the very objectives for which an agreement was concluded, for example, the use of atomic weapons in violation of an arms control and disarmament agreement concluded to outlaw atomic war or the refusal to arbitrate a dispute in violation of an agreement which was concluded for that purpose.

Procedural breaches are those which relate to the manner or the means by which the substantive provision, the objectives of international law generally, or of treaties in particular, are to be attained, or by which the benefits contemplated by the agreement are to be verified or protected, such as breaches of the provisions of an arms control and disarmament agreement which require reports of activities, the facilitation of inspections and verification procedures, and the interrogation of witnesses with respect to suspected violations of the agreement. The tactics of the North Koreans in frustrating the inspection and verification procedures of the Korean Armistice Agreement provide examples of procedural breaches.

Anticipatory or constructive breaches are those committed before there is a present duty of performance under international law generally, or the provisions of a treaty in particular. Such a breach may be the outcome of words or conduct which evidence an intention to refuse performance of a duty in the future as, for example, notice to one contracting party by another that it will not comply with its commitment to come to the other party's defense should it be the object of an armed attack.

Responses which arise incident to breaches of customary or conventional law may be categorized according to their intended purpose as anticipatory, preventive, remedial, or punitive.

Anticipatory responses are those intended to deter a contracting party from committing a breach when there is substantive evidence—words or conduct—that the party is about to breach its obligations, as, for example, by military preparations for aggressive purposes or conduct which evidences an intention to disregard future treaty obligations to which it is committed.<sup>12</sup>

Preventive responses or sanctions are intended upon their imposition to deter a contracting party which has already breached the provisions of the agreement from committing further breaches.<sup>13</sup>

Corrective, remedial, or restorative responses are intended primarily to restore the *status quo*. A response of this nature is intended to insure that the benefits which were visualized by the

---

<sup>12</sup> See Royal Institute of International Affairs, *supra* note 3, at 1.

<sup>13</sup> See Fisher, "Internal Enforcement of International Rules" in *Disarmament: Its Politics and Economics* 107-08 (Melman ed. 1962).

treaty are realized. Examples would be the refusal by a victim of a breach to continue to comply with his reciprocal obligation under the breached treaty, or a response by the victim which negates the benefit which the transgressor would otherwise obtain. The U.N. Command's response to the violations of the Korean Armistice Agreement pertaining to the introduction of weapons and replacement weapons was, in essence, correction through reciprocal non-compliance.<sup>14</sup> Remedial response may also be used to restore to the victim of a breach all the benefits which he was denied and to provide him compensation for damage suffered because of the breach. The U.N. Command's response to breaches by the North Koreans of the Korean Armistice Agreement were in part restorative.<sup>15</sup>

A response or sanction, if in some measure intended as punishment or retribution, is termed punitive. Generally, peace treaties are partially punitive in purpose and nature.<sup>16</sup>

### III. RESPONSES TO VIOLATIONS OF TREATIES AND AGREEMENTS

#### A. *Responses Available to States Individually*

Individual states may respond to violations or alleged violations of international agreements in several ways. The responses may range from no action whatsoever to war. Some of the responses which states are capable of making, however, are not authorized by international law. A response which is illegal constitutes conduct which is itself sanctionable. Responses which are authorized by international law are, for purposes of this paper, referred to as sanctions; those which are illegal, as sanctionable responses.

The various responses and the circumstances under which recourse to them would be illegal are considered below. Under certain circumstances, either through fear of unfavorable consequences or because the breach is accidental or inconsequential, or because the victim of the breach, whether the breach be minor or serious, does not desire to jeopardize the continuance of other provisions of the breached agreement from which it derives benefit, it is possible that a state may make no response to breaches of international agreements. A failure to make a response is sanctionable only when the failure to take action is itself a breach of a treaty obligation. Thus, a party to a multilateral non-aggression treaty which is ob-

---

<sup>14</sup> Summary Report, Woods Hole Summer Study on Verification and Response in Disarmament Agreements 10 (1962).

<sup>15</sup> See Henkin, "Enforcement of Arms Control: Some Basic Considerations," Annex Vol. II, Woods Hole Study on Verification and Response in Disarmament Agreements 42-43 (1962).

<sup>16</sup> *Id.* at 42-43.



ligated thereby to provide military assistance to another party to the treaty should that party be the object of an armed attack, would be in breach of the treaty should it fail to comply with its obligations. Its failure to comply with its treaty commitment under these circumstances would constitute a sanctionable breach. A member state of the U.N. would be in breach of its treaty obligation should it refuse when called upon by the Security Council under Articles 41 or 42 of the U.N. Charter to take measures not involving the use of armed force against another state for a purpose specified in Article 39.

### 1. Pacific Settlement of Disputes

#### a. *Responses of a Political or Diplomatic Nature*

##### (1) Negotiation.

Negotiation, the simplest method of resolving differences, is also the most effective. It is the method which most treaties of pacific settlement recognize as the first measure which disputants are to take in the settlement of their differences. The importance and effectiveness of this method of resolving disputes is not fully appreciated. Neither has it been stressed or perfected to the full extent of its potential. The vast majority of disputes are settled satisfactorily by negotiation, and many of those that are not so settled would probably not have become acute had they been left for compromise at the diplomatic level.<sup>17</sup> Most treaties which provide for compulsory arbitration or judicial settlement specify, as a condition precedent to such settlement, that a showing be made that their settlement by negotiation was attempted but was unsuccessful.<sup>18</sup> Article 40 of the U.N. Charter also exhorts the parties to that Charter to resort to negotiation before they have recourse to the Security Council. Negotiation is effective because it is conducive to compromise and concessions.<sup>19</sup> Additionally, it provides a means whereby the parties may alter, as between themselves, the rules of law upon which their dispute rests.<sup>20</sup>

##### (2) Good Offices and Mediation.

It is possible that disputes which have not been settled through negotiation, either because the parties have failed to reach an

<sup>17</sup> 2 Wheaton, *International Law* 2 (7th ed. Keith 1944). See 2 Oppenheim, *International Law* 6-7 (7th ed. Lauterpacht 1952).

<sup>18</sup> Gould, *An Introduction to International Law* 540 (1957). See the General Act of Geneva (1929), and the General Treaty of Inter-American Arbitration, Jan. 5, 1929, 49 Stat. 3153, T.S. No. 886, 130 L.N.T.S. No. 135; The Hague Convention for the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, T.S. No. 392; 4 Hudson, *International Legislation* 2529-44 (1932).

<sup>19</sup> 2 Oppenheim, *op. cit. supra* note 17, at 7.

<sup>20</sup> Gould, *op. cit. supra* note 18, at 541.

agreement or because one or both of the parties refused to attempt a settlement in this manner may nevertheless be brought to a negotiated settlement through an offer by a third state of its good offices or through its mediation. Such an offer may have been tendered with or without any solicitation from either of the disputing states. Good offices or mediation may also be tendered or provided by an organ of the U.N. or by some other international organization or agency.

In 1937, the war between Bolivia and Paraguay over the Gran Chaco was brought to a conclusion through the mediation efforts of Argentina, Brazil, Peru, the United States, and Uruguay.<sup>21</sup> In 1949, the hostilities in Palestine were concluded through the efforts of mediators—Count Bernadotte and later Dr. Ralph Bunch—who had been appointed by the General Assembly of the U.N. in 1948.<sup>22</sup> Good offices consist of acts which may bring the disputing parties together for negotiation. In mediation the third state actually takes part and conducts negotiations between the disputing states on the basis of proposals which are made by the mediator state.<sup>23</sup> In the Dogger Bank incident of 1904 it was through the mediation of France that Great Britain and Russia agreed upon the establishment of an International Commission of Inquiry for the purpose of resolving a dispute between them that might have led to war.<sup>24</sup>

### (3) Commissions of Inquiry.

Disputing states which are unwilling to entrust the adjudication of their dispute to an arbitral tribunal or to a court are often willing to empower a Commission of Inquiry to ascertain the facts of the dispute so that the parties may determine, on this basis, the legal effect which they will accord to the facts as found. Generally, it is the duty of a Commission of Inquiry to investigate the circumstances of a case and to issue a report thereon which is limited to a statement of facts. The findings of the Commission do not have the character of an award and the parties are free to give to the statement of facts rendered whatever effect they desire.<sup>25</sup>

### (4) Conciliation.

Under this form of response parties may refer their dispute to

---

<sup>21</sup> Documents on International Affairs 538-54 (Heald ed. 1936).

<sup>22</sup> See Leonard, "The United Nations and Palestine," 454 Int'l Conc. 603 (Oct. 1949).

<sup>23</sup> 2 Oppenheim, *op. cit. supra* note 17, at 10. For instances of meditation see 2 Wheaton, *op. cit. supra* note 17, at 4-8.

<sup>24</sup> Scott, Hague Court Reports 403 (Perm. Ct. Arb. 1905). See also 2 Oppenheim, *op. cit. supra* note 17, at 11, 13. At the Hague Conference in 1899 the fact-finding agencies achieved the status of a formal international institution. See Hague Convention for the Pacific Settlement of International Disputes, *supra* note 18.

<sup>25</sup> See 2 Oppenheim, *op. cit. supra* note 17, at 12-16.

a Commission to whom they give the duty of ascertaining the facts and submitting a report which contains proposals for the settlement of the dispute. The report, however, does not have the binding character of an award or judgment. Conciliation differs from Inquiry in that it enlists the active services of a Commission in bringing the disputants to an agreement. It differs from arbitration and judicial settlement, which will be discussed later, in that under conciliation the disputants have no legal obligation to adopt proposals which are suggested to them. The underlying features of the Bryan Conciliation Treaties of 1914 were the establishment of permanent conciliation committees and a provision for a cooling-off period, the latter being a device to prevent the parties from resorting to hostilities until after the publication of the report of the conciliation commission. The cooling-off principle was incorporated in the Covenant of the League of Nations which forbade resort to war for a period of three months after the receipt of a Council report or an arbitral or judicial award.<sup>26</sup>

Although many post-World War I treaties provided for conciliation, recourse to it has been comparatively rare,<sup>27</sup> probably because of the ready availability of the more perfected and varied machinery of the League of Nations and the United Nations for the peaceful resolution of disputes.<sup>28</sup>

(5) Recourse to the United Nations.

Members of the U.N. have agreed under the Charter to resolve their disputes by peaceful means. To insure the attainment of this objective the U.N. Charter provides for action by the Security Council in the event of threats to, or breaches of, the peace. The Council is also empowered to investigate disputes and situations to determine whether they endanger the peace and to recommend appropriate methods for the settlement of disputes. The General Assembly may also make recommendations for peaceful resolution of problems or situations which are likely to impair the general welfare, or the friendly relations between states, except in cases in which the Security Council is seized of the matter.

A member of the U.N. may also bring a dispute or a situation which is dangerous to peace to the attention of the Security Council or the General Assembly. If the Security Council considers that a dispute which is not settled by the procedures recommended in Article 33 (negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means) may endanger the peace, it may

---

<sup>26</sup> *Id.* at 15-20; Gould, *op. cit. supra* note 18, at 543-44.

<sup>27</sup> Gould, *op. cit. supra* note 18, at 544-45.

<sup>28</sup> See 2 Oppenheim, *op. cit. supra* note 17, at 18-20.

intervene and recommend an appropriate means of settlement. It may recommend that a dispute be settled by the International Court of Justice as suggested by Article 36. It may also employ military or nonmilitary measures of coercion to deal with threats to the peace, breaches of the peace, and acts of aggression, as it did in the recommendation of July 27, 1950, passed in the absence of the Soviet delegation, that members take action necessary to repel North Korean aggression.

The General Assembly has now taken upon itself the power to consider and make recommendations (which are not binding on the members) for collective measures whenever the Security Council's Permanent Members are divided and thus unable to meet their responsibilities under the Charter. This device has enabled the General Assembly to avoid inaction by the international community which would otherwise result from the recourse by one of the Permanent Members of the Council to its veto powers.<sup>29</sup>

The Secretary General of the U.N. has recently assumed an important role in the maintenance of peace. This development was dictated in large measure by the cold war, mutual nuclear deterrence, and the legal and other impediments to an effective functioning of the Security Council and the Assembly in the preservation and the restoration of peace. Since 1956, when the General Assembly created a U.N. Emergency Force in the Middle East which gave to the Secretary General the responsibility of establishing and directing the Force, the Secretary General has been given heavier and heavier peacekeeping responsibilities. To date the office of the Secretary General is itself a significant factor in diplomatic negotiations. It has been aptly stated that the Secretary General "serves as a catalyst in facilitating quiet (private) diplomacy"<sup>30</sup> either on his own initiative or at the request of the parties to an issue. It was through the Secretary General's good offices that quiet negotiations were undertaken between the United States and Russia during the Cuban crisis in the fall of 1962 and it was the Secretary General who facilitated an exchange of views and provided suggestions on means for reconciliation. Since the Secretary General has but one interest, the maintenance of peace, he provides a unique factor which not only facilitates diplomatic negotiations, but in some measure precludes the possibility that negotiations on important matters may be hastily terminated.

#### (6) Appeal to Public Opinion.

Public opinion in some instances acts as a deterrent to breaches

---

<sup>29</sup> See Gould, *op. cit. supra* note 18, at 568-70; 2 Oppenheim, *op. cit. supra* note 17, at 96-120.

<sup>30</sup> Hovet, "United Nations Diplomacy," XVII J. Int'l Aff. No. 1, at 34-35 (1963).

of treaties. No state which persistently refuses to abide by its treaty commitments can expect to be able to maintain or develop essential treaty relationships or to retain good standing in the international community. The deterrent effect of public opinion is clearly evidenced by the effort that states which are accused of breaches expend denying, explaining, or justifying international law breaches which they are alleged to have committed.<sup>31</sup>

In 1907 Secretary of State Elihu Root, commenting upon the binding effect of international law, concluded "that the difference between municipal and international law, in respect to the existence of forces compelling obedience, is more apparent than real, and that there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law."<sup>32</sup> He observed that it would be a mistake to assume that the

sanction which secures obedience to the laws of the state consists exclusively or chiefly of the pains and penalties imposed by the law . . . for its violation. It is only in exceptional cases that men refrain from crime through fear of fine or imprisonment. In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standards of conduct prescribed by that community for its members. . . . Not only is the effectiveness of the punishments demanded by law against crime derived chiefly from the public opinion which accompanies them, but those punishments themselves are but one form of the expression of public opinion. Laws are capable of enforcement only so far as they are in agreement with the opinions of the community in which they are to be enforced. As opinion changes old laws become obsolete and new standards force their way into the statute books. Laws passed, as they sometimes are, in advance of public opinion ordinarily wait for this enforcement until the progress of opinion has reached recognition of their value. The force of law is in the public opinion which prescribes it.<sup>33</sup>

The effectiveness of public opinion as a deterrent to breaches of agreements, however, has always been debatable. It is "an amorphous concept,"<sup>34</sup> and being so it is difficult to determine to what

<sup>31</sup> Brierly, "Sanctions," 17 *Transact. Grot. Soc'y* 67, at 68 (1932), states that in international law the cause of obedience is simply the force of opinion, the conviction of the majority of the states that obedience to law is not a matter of individual choice, but is obligatory. Sanctions, he states, however highly organized, can never be stronger than the conviction upon which they rest. See Hovet, *supra* note 30, at 31.

<sup>32</sup> Root, "The Sanctions of International Law," *Proceedings of the American Society of International Law* 14, 16 (1908).

<sup>33</sup> *Id.* at 16-17.

<sup>34</sup> Ikke, "After Detection—What?" 39 *Foreign Affairs* 209 (1961).

extent it could injure or deter a violator or a potential violator of agreements which pertain to such important matters as arms control or disarmament. It has been said that one reason opinion is so impotent is that "it has a very short memory." The recent Hungarian revolution is an illustration. Furthermore, opinion can be brought into play effectively only when unequivocal evidence exists to support an alleged breach. Such evidence is usually unobtainable or, if obtainable, is so technical that the public is generally unable fully to comprehend or evaluate it.<sup>35</sup>

On occasions domestic public opinion may in fact preclude the application of effective sanctions even when recourse to them would be in the best public interest. Public opinion may even be responsible for breaches of international commitments or responses which are ineffectual.<sup>36</sup> Two examples of such results are Britain's reluctance to rearm in response to German violations of the Versailles Treaty and Britain's unwillingness to impose effective anticipatory economic sanctions upon Italy in 1934 when it was evident beyond doubt that Italy would attack Ethiopia in violation of the Covenant of the League of Nations. It is probable, furthermore, that the imposition of sanctions, or the threat thereof, for breaches of international obligations would serve only to unify public opinion within the transgressor state and, as such, provide to that state the support it needs to combat the sanctions' effectiveness.

(7) Non-Recognition or the Withdrawal of Recognition of a Government.

Under particular circumstances non-recognition, or the withdrawal of recognition, of a government may serve as an effective political measure in the enforcement of treaty obligations. It can be employed in instances where revolution results in a radical change in government as a means of motivating that government, for example, to respect the treaties which were concluded by its predecessor, or in retaliation should that government refuse to respect the treaty obligations which have been assumed by the state under its prior form of government.<sup>37</sup>

b. *Recourse to Judicial Procedures.*

(1) Arbitration.

Arbitration is the voluntary settlement of a dispute between states by means of a legal decision reached by one or more un-

---

<sup>35</sup> *Id.* at 212.

<sup>36</sup> Royal Institute of International Affairs, *supra* note 3, at 137.

<sup>37</sup> For a discussion of the political and legal aspects of the non-recognition of governments see Gould, *op. cit. supra* note 18, at 241-58; 1 Oppenheim, *International Law*, 129-39 (8th ed. Lauterpacht 1955).

pires, or by a tribunal (other than the International Court of Justice) which is selected by the parties to the dispute. The award of an arbitral tribunal is based on law, just as is the decision of the International Court of Justice, unless the parties to arbitration stipulate otherwise. If the parties so desire, however, the dispute may be settled on the basis of equity and justice or on other rules specified in the treaty of arbitration for the special case. An arbitral award is final if the arbitration treaty does not provide to the contrary, and it is binding on the parties if the arbitrators have fulfilled in all respects their duties under the arbitration treaty and have reached their decision in full independence. Should a party to a valid arbitral award fail to comply with the award, the other party would have the right to enforce it by such compulsory means as are authorized by international law.<sup>38</sup> Awards rendered in excess of the powers conferred upon the arbitrators or which are tainted with fraud, however, are null and void.<sup>39</sup>

(2) International Court of Justice.

The parties may submit their disputes for adjudication to the International Court of Justice. The jurisdiction of the court is based upon the consent of states given either generally in advance or *ad hoc* upon the occurrence of a dispute. The jurisdiction of the court is voluntary with respect to those cases which are referred to it by special agreements. The jurisdiction of the court is obligatory, either by special provisions to that effect in treaties, or by virtue of the so-called "optional clause" of Article 36 of the statute of the International Court of Justice which permits declarations by states that they consent in relation to other states which also consent to the same obligation to submit to the jurisdiction of the court in all or any of four types of legal disputes involving (1) the interpretation of a treaty, (2) a question of international law, (3) the existence of any fact which, if established, would constitute a breach of an international obligation, and (4) the nature and extent of the reparations to be made for the breach of an international obligation. Many states which have accepted the "optional clause" have attached broad reservations such as the United States' Connally Reservation. These reservations may, of course, be invoked against the reserving state by the other party to the dispute.

The court may also render advisory opinions when they are sought by the General Assembly, the Security Council, other or-

---

<sup>38</sup> See 2 Oppenheim, *op. cit. supra* note 17, at 24-28.

<sup>39</sup> For a discussion of the problem of an alleged exercise of excessive jurisdiction by an arbitral tribunal and instances of exercise of excess jurisdiction see Gould, *op. cit. supra* note 18, at 547-52; 2 Oppenheim, *op. cit. supra* note 17, at 27-29.

gans of the United Nations, and specialized agencies authorized by the General Assembly to ask for such opinions. The advisory opinions are designed to aid the Security Council and the General Assembly in performing duties of conciliation by providing legal opinions on disputed points of law. The court under Article 38 of the statute may apply (1) international conventions, (2) international custom, (3) the general principles of law recognized by civilized nations, and (4) certain judicial decisions and the teachings of publicists. Additionally, the court may, if the parties agree, decide cases *ex aequo et bono*.

The judgments of the court are final and without appeal except insofar as the rules permit interpretation and revisions of decisions. Except for a few cases, judgments of the court have in the past been executed without serious difficulties. Under Article 94 of the Charter of the United Nations, a litigant may appeal to the Security Council for action to enforce a court judgment in its favor. The Security Council, if it sees fit, can take such measures as may be required to secure execution of the court's judgment.<sup>40</sup>

## 2. Coercive Settlement of Disputes, Unfriendly or Forceful Acts Short of War.

The coercive measures short of war<sup>41</sup> to which states may have recourse for breaches of treaty obligations include retortion and reprisal. Retortion is an act which, although legal, is discourteous, unfriendly, or inequitable. It is an act which a state may take in retaliation for the same or a similar type of act by another state. Ordinarily retortion is taken in consequence of a legislative, administrative, or judicial act of another state which although legal under international law is nevertheless objectionable or injurious. In practice states have had recourse to retortion principally in cases of unfair treatment of their nationals, the application to their nationals of discriminatory passport regulations and fiscal duties, a denial of entry to their ships or goods, the severance of diplomatic relations, and other acts which affront the dignity of a state.

As the act which provoked retortion is a legal one, the act of retortion must also be one which is lawful under international law. Thus, the repudiation of a treaty obligation would not be a legitimate act of retortion and, not being so, would constitute a

---

<sup>40</sup> Gould, *op. cit. supra* note 18, at 558-68. See 2 Oppenheim, *op. cit. supra* note 17, at 42-88, for a complete discussion of the jurisdiction of the court, its composition, and procedures.

<sup>41</sup> See Colbert, *Retaliation in International Law* 1-3, 200, 203 (1948).



breach of law which is legally sanctionable under international law.<sup>42</sup>

Reprisals<sup>43</sup> are means whereby a state may seek, within the limits prescribed by the United Nations Charter, to obtain justice through self-help.<sup>44</sup> Further limitations within the context of the United Nations Charter upon the resort to reprisals include the prohibition of their use in the absence of some attempt to obtain an amicable settlement of the delinquency in issue; their termination when reparations have been made; the prohibition of reprisals which are out of proportion to the act prompting them; and the prohibition of reprisals against reprisals.<sup>45</sup> Reprisal is a means by which states obtain satisfaction for breaches of international law which they do not consider important enough for a declaration of war but which require some remedial action. In the past recourse to acts of reprisal was often abused. Reprisals were usually imposed only on weaker states which were physically incapable of taking effective countermeasures. Today, only those reprisal measures which are of a non-forcible nature and which involve no threat to use force in the absence of satisfaction, may legally be imposed.<sup>46</sup> Thus all measures involving the use of force or the threat to use force, once permissible under customary international law as reprisal measures, have now been outlawed by conventions of universal or general applicability.<sup>47</sup>

---

<sup>42</sup> Gould, *op. cit. supra* note 18, at 589-90; 2 Oppenheim, *op. cit. supra* note 17, at 134-35; Starke, *An Introduction to International Law* 342 (4th ed. 1958).

<sup>43</sup> All of the important modern texts on international law continue, incorrectly, to define reprisals as they did before the Kellogg-Briand Pact of 1928 and the U.N. Charter, as any kind of forcible or coercive measure whereby one state seeks to exercise a deterrent effect or to obtain redress or satisfaction, directly or indirectly, for the consequences of the illegal acts of another state, which has refused to make amends for such conduct. See Briggs, *The Law of Nations* 958 (2d ed. 1952); Gould, *op. cit. supra* note 18, at 590; 2 Oppenheim, *op. cit. supra* note 17, at 136, 143-44; Starke, *op. cit. supra* note 42, at 342-43.

<sup>44</sup> Gould, *op. cit. supra* note 18, at 593; 2 Oppenheim, *op. cit. supra* note 17, at 143-44.

<sup>45</sup> See *The Venezuelan Preferential Case* (Germany, Great Britain, Italy v. Venezuela), in Scott, *Hague Court Reports* 55 (Perm. Ct. Arb. 1904); *The Naulilaa Case* (Portugal v. Germany), *Annual Digest and Reports of Public International Law Cases* 1927-1928, Case No. 360.

<sup>46</sup> See Brownlie, *International Law and the Use of Force by States* 281, 431 (1963); McDougal & Feliciano, *Law and Minimum World Public Order* 142-43 (1961); 2 Oppenheim, *op. cit. supra* note 17, at 144; Starke, *op. cit. supra* note 42, at 344; Stone, *Legal Controls of International Conflict* 286 (1954); Kuntz, "Sanctions in International Law," 54 *Am. J. Int'l L.* 324, 333-34 (1960).

<sup>47</sup> Wright, "Subversive Intervention," 54 *Am. J. Int'l L.* 529 (1960). Cf. Colbert, *op. cit. supra* note 41, at 200-06.

Under the Kellogg-Briand Pact of 1928,<sup>48</sup> which is still in full force and effect, the signatories undertook that the "settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by specific means."<sup>49</sup> This pre-World War II limitation on extra-legal coercive action has been confirmed by the Charter of the United Nations.<sup>50</sup>

The Preamble of the Charter declares that one of its purposes is "to insure, by the acceptance of principles and the institution of methods that armed force shall not be used save in the common interest." Paragraph 3 of Article 2 of the Charter, which gives effect to its principles, obliges the members of the United Nations to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." Under this provision the use of forcible or coercive measures is restricted to circumstances which do not constitute an "international dispute" and, in the absence of such a dispute, to measures of a peaceful nature.

Paragraph 4 of Article 2 of the Charter further restricts the scope of measures available in the settlement of international disputes in that it provides, more specifically, that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."

As observed by Oppenheim the "comprehensiveness of these provisions can hardly be surpassed."<sup>51</sup> The prohibition under Article 2 of the Charter thus extends both to the use of force and to the threat to use force. The word "force" in the context of Article 2 of the Charter means armed force. It does not encompass economic or political measures. The prohibition of recourse to armed force, or the threat to use armed force, in the settlement of international disputes is tightened and reaffirmed by other provisions of the Charter: Article 33 obliges the parties to any dispute likely to endanger peace and security to seek a solution by specified peaceful procedures, and Article 39 vests in the Security Council jurisdiction, insofar as the application of enforcement action is concerned, over any threats to the peace, breach of the peace, or

---

<sup>48</sup> Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57.

<sup>49</sup> The Treaty of Rio de Janeiro of 1933, which binds the American States, provides that the settlement of disputes shall be effected solely by pacific means permissible under international law. See Stone, *op. cit. supra* note 46, at 286.

<sup>50</sup> June 26, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>51</sup> 2 Oppenheim, *op. cit. supra* note 17, at 153; Stone, *op. cit. supra* note 46, at 286-87.

act of aggression.<sup>52</sup> Under the Uniting for Peace Resolution,<sup>53</sup> a *de facto* revision of the Charter, the General Assembly assumed the authority to urge the employment of collective measures to insure the peace whenever the veto procedure in the Security Council paralyzed that body. In paragraph 4 of Article 2 of the Charter the obligation of the members of the United Nations not to resort to force or the threat to use force is not limited by the words "against the territorial integrity or political independence of any state." In any event it would appear that "territorial integrity" coupled with "political independence" is for all practical purposes synonymous with territorial inviolability, and a state would be in breach of its Charter obligation if it were to invade or commit an act of force within the territory of another state, in anticipation of an alleged impending attack, or to obtain redress without the intention of interfering permanently with the territorial integrity of another state.<sup>54</sup> The prohibitions of the Charter are all-inclusive except for the use of force when directed by the Security Council, or when recommended by the General Assembly for the purposes of the Charter, or in self-defense consistent with the provisions of Article 51 of the Charter. As to self-defense, Article 51 provides:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in excess of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Thus, although the Charter enlarges the right of self-defense by authorizing both individual and collective defense (a member being permitted to have recourse to action in self-defense when

<sup>52</sup> Stone, *op. cit. supra* note 46, at 287.

<sup>53</sup> U.N. Gen. Ass. Off. Rec. 5th Sess., Plenary 302 (A/1481) (1950). See Sohn, *Cases on United Nations Law* 229-46 (1956).

<sup>54</sup> See 2 Oppenheim, *op. cit. supra* note 17, at 154. In 1948 the United States and other American States assumed an obligation to limit the use of forcible or coercive procedures even broader than that contained in the U.N. Charter. Article I provides: "The High Contracting Parties, solemnly affirming their commitments made in earlier international conventions and declarations, as well as in the Charter of the United Nations, agree to refrain from the threat or the use of force, or from any other means of coercion for the settlement of their controversies, and to have recourse at all times to pacific procedures." See Falk, "Janus Tormented: The International Law of Internal War," in *International Aspects of Civil Strife* n. 187 (Rosenau ed. 1964).

it or any other state whose safety is deemed vital to its own safety and independence is the object of an armed attack), it also confines the right of armed self-defense to instances of armed attack. It thus negates recourse by states to the use of armed force in anticipation of an armed attack or to the use of force which falls short of armed attack. However unfortunate this restriction may be in periods of sweeping technological advances in weaponry which preclude the taking of practical measures to insure adequate advance warning of an armed attack, it would appear that recourse to anticipatory armed attack for defense purposes is now legally impermissible.

This deficiency could only be legally rectified by an appropriate amendment to the Charter, there being no legislative authority capable of filling this serious security gap.<sup>55</sup> It is the opinion of some legal publicists, however, that paragraph 4 of Article 2 of the United Nations Charter does not deny states the right to enforce their international rights by a resort to force or the threat to use force when the enjoyment of their fundamental international rights is legally denied and when the collective measures contemplated by the Charter are rendered inoperative or are frustrated. Under such circumstances, they argue, the sanctions of customary international law are revived and may be resorted to legally. This conclusion is predicated on the fact that the Charter is particular international law which is based on general international law. The principles and norms of the latter are revived and replace treaty norms that are no longer operative.<sup>56</sup> Other legal publicists contend that since the Charter refers to the right of self-defense as an "inherent right" it can still be applied where it is permitted under general international law, not only against actual attack but also against a threatened aggression when the danger is imminent.<sup>57</sup> These views to date have not received any general support. As a practical matter it is to be anticipated that states will continue to view self-defense as a matter which is proper for determination on political, not legal, grounds. As such it is unlikely that states will forego the use of force or the threat to use force for purposes of self-defense against action which is not in the nature of an armed attack.

---

<sup>55</sup> See Kuntz, *supra* note 46, at 327, 341, 345.

<sup>56</sup> Stone, *Aggression and World Order* (1958); Waldock, "The Regulation of the Use of Force by Individual States in International Law," 81 *Recueil des Cours* (II) 455 (1952). See also *The Corfu Channel (Merits) Case*, [1949] I.C.J. Rep. 5; cf. Kuntz, *supra* note 46, at 345.

<sup>57</sup> Colbert, *op. cit. supra* note 41, at 200; Thomas & Thomas, *Non-Intervention: The Law and Its Import in the Americas* 123, 307 (1956).

The right to use force in self-defense is authorized only for so long as the Security Council has not taken the steps necessary to maintain or restore international peace and security. The authority to use armed forces in self-defense in cases of armed attack is in itself an exceptional authorization which is dictated by the requirement for the unanimity of the permanent members of the Security Council before U.N. action can be undertaken to preserve or maintain international peace and security. This restrictive provision makes it difficult and, in some cases, impossible, for the Security Council to fulfill its primary function. It is this situation which motivated the member states to conclude multilateral treaties for collective defense. The North Atlantic Treaty of 1949;<sup>58</sup> the Treaty of Economic, Social, and Cultural Collaboration and Collective Self-Defence of 1948;<sup>59</sup> the Inter-American Treaty of Reciprocal Assistance, signed September 2, 1947,<sup>60</sup> in Rio de Janeiro; and the Charter of the Organization of American States, signed at Bogota on April 30, 1948,<sup>61</sup> were all concluded for the purpose of affirming and giving effectiveness to the right of collective defense.

The more important types of reprisals are pacific blockade, embargo, and boycotts—financial or economic.

Pacific blockade is a measure employed to cut off ingress to and egress from a state by naval operations and to compel the state so isolated to yield to demands—to grant redress for an illegal act. This is to be deemed pacific only in the sense that the blockading state is disposed to remain at peace while the blockaded state does not elect to treat the operation as producing war or as compelling it to declare or wage war. According to the rules of pacific blockade, the blockading state may detain or sequester ships of the blockaded state only. Theoretically, as there is no war, no search or visit may legally be undertaken of ships of third countries which enter or depart the ports of the blockaded state. A blockading state, however, has the right to identify ships which attempt to pass the blockade. In a belligerent blockade belligerent states have the right to cut off access by sea to enemy-controlled locations and the blockading states may seize as contraband articles destined for the enemy and may confiscate all vessels bound for enemy ports with contraband goods.<sup>62</sup>

---

<sup>58</sup> April 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964, 34 U.N.T.S. 243.

<sup>59</sup> Cmd. No. 7367 (1948). Great Britain, Belgium, France, Luxembourg, and the Netherlands were parties to the treaty.

<sup>60</sup> 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 79.

<sup>61</sup> [1951] 2 U.S.T. & O.I.A. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

<sup>62</sup> See Hindmarsh, *Force in Peace* (1933); Hogan, *Pacific Blockade* (1908).

In a memorandum on pacific blockades prepared for the League of Nations in 1928,<sup>63</sup> Giraud, a member of the Secretariat, concluded that all of the great European powers had resorted to pacific blockades on numerous occasions; that no great non-European power had ever resorted to pacific blockades; that "pacific blockades have practically never been instituted except by powerful states against weaker ones (small states possessing no powerful fleet)"; that pacific blockades had been instituted by individual states to obtain reparations for alleged wrongs or "by the Great Powers acting in concert to put an end to some disturbance, prevent the outbreak of war, insure the execution of general treaties, or safeguard the interests of humanity."

The United States has consistently opposed the application of pacific blockades to American vessels and has denied the legitimacy of such action.<sup>64</sup> All cases of pacific blockades are either cases of intervention or of reprisal,<sup>65</sup> and both are illegal under paragraphs 3 and 4 of Article 2 and Article 33 of the Charter of the United Nations unless resorted to unilaterally or collectively as an enforcement action under Article 42 of the Charter.<sup>66</sup>

The Cuban quarantine, as it was applied, was a cross between a peaceful and a belligerent blockade. It differed from a peaceful blockade in that it was directed not only against the ships of the blockaded state but as well against those of non-blockaded nations. It has been stated by some commentators that the blockade was imposed in redress of an illegal act—aggression—and in self-defense. It differed from a belligerent blockade in that it was not intended that the goods or the ships of third parties would be confiscated. It is not the purpose of this paper to discuss the legal pros and cons of the Cuban quarantine, a subject to which much scholarly attention has already been devoted. There is authority to substantiate both views on the legality of the quarantine as imposed by the United States.<sup>67</sup> What is more important than the legality of this action, however, is the very dangerous prece-

---

<sup>63</sup> Doc. A 14, V. 14, p. 89 (1927).

<sup>64</sup> See Briggs, *op. cit. supra* note 43, at 959; Rowson, "Modern Blockade: Some Legal Aspects," 23 Brit. Yb. Int'l L. 346-53 (1946).

<sup>65</sup> 2 Oppenheim, *op. cit. supra* note 17, at 145, 149, 159-66, 196-97.

<sup>66</sup> See Starke, *op. cit. supra* note 42, at 86-88.

<sup>67</sup> It can be argued in support of the quarantine that Article 8 of the Rio Pact, which provides for the complete interruption of sea communications, recognizes and authorizes measures of this sort, and that such action is compatible with and is authorized by Article 52 of the United Nations Charter, which leaves to regional arrangements or agencies the responsibility for the maintenance of international peace and security in such instances as are appropriate for regional action. Some have argued, on the other hand, that the Rio Pact authorizes only peaceful non-intercourse with an offending state, not a blockade which is incompatible with the U.N. Charter; the provisions of which are binding on international arrangements and agencies. Those who

dent which it may have established in the field of anticipatory self-defense.

In its technical sense an embargo is a form of reprisal consisting of the forcible detention of the ships of states which are alleged to have committed a breach of international law, in order to compel reparation for the wrong done. Today, selective embargoes, as distinguished from total embargoes under which states individually or collectively refused either to sell or purchase from another state, have become a common measure. This measure has generally been adopted not only as a reprisal undertaken by an injured state but also to preclude an aggressor state from increasing its war-making potential, to prevent the aggravation of civil strife in a state in which domestic violence exists, to comply with a state's international duty as a neutral in time of war, or to deny to belligerents implements or materials of war.<sup>68</sup> Embargoes now may be employed by states individually or collectively as reprisals or as collective enforcement actions under Articles 39 and 42 of the Charter of the U.N. to reduce an alleged aggressor's capability to undertake or to continue its belligerent activities.<sup>69</sup>

esponse this position assert that if the Rio Pact intended to the contrary, it is incompatible with the principles and purposes of the United Nations, for a quarantine constitutes a use of force or a threat to use force which is contrary to the provisions of Articles 2 and 33 of the U.N. Charter which permits states to take action of this nature only to repel an armed attack. Others have supported the Cuban quarantine as an exercise of self-defense under Article 51 of the U.N. Charter.

See Christol & Davis, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Material to Cuba, 1962," 57 Am. J. Int'l L. 525 (1963); Claude, "The OAS, the UN, and the United States," 547 Int'l Conc. 63 (March 1964); Henkin, "Force, Intervention, and Neutrality In Contemporary International Law," Proceedings of the American Society of International Law 147-63, 165-73 (1963); Mallison, "Limited Naval Blockade or Quarantine—Interdiction: National and Collective Defense Claims Valid Under International Law," 31 Geo. Wash. L. Rev. 335 (1962); Meeker, "Defensive Quarantine and the Law," 57 Am. J. Int'l L. 515 (1963); Oliver, "International Law and Quarantine of Cuba: A Hopeful Prescription for Legal Writing," 57 Am. J. Int'l L. 373 (1963); Seligman, "The Legality of U.S. Quarantine Action Under the United Nations Charter," 49 A.B.A.J. 142 (1963); Wright, "The Cuban Quarantine," Proceedings of the American Society of International Law 9-10 (1963); Wright, "The Cuba Quarantine," 57 Am. J. Int'l L. 546 (1963). During the 1963 Proceedings of the American Society of International Law, Milton Katz, Harvard Law School (at 162-63, 169, 170), Louis Henkin, Columbia Law School (at 147-73), L. B. Sohn, Harvard Law School (at 171, 208), and Quincy Wright, Columbia Law School (at 9-10, 16-17, 171) questioned the legality of the Cuban quarantine. During the same proceedings, Myres S. McDougal, Yale Law School (at 162-69, 170-71), Abram Chayes, Legal Advisor, Department of State (at 10-13), and W. T. Mallison, George Washington Law School (at 170) considered the quarantine as an action compatible in all respects with international law.

<sup>68</sup> See 2 Oppenheim, International Law 141-42 (7th ed. Lauterpacht 1952); Stone *op. cit. supra* note 46, at 291.

<sup>69</sup> Gould, An Introduction to International Law 594 (1957); Stone, *op. cit. supra* note 46, at 291.

Embargoes in the past have usually been of a selective nature: on arms, ammunition, and materials essential for the production of arms, or on oil and other products which are necessary for the conduct of hostilities. At the present time Communist China is under a total embargo imposed by the United States. During the Italo-Ethiopian conflict of 1935-36 the League of Nations imposed a partial embargo upon Italy without success.<sup>70</sup> Arms embargoes were also employed by the League of Nations in the Chaco dispute, by the U.N. in the Palestine crisis of 1948, and unilaterally by states in numerous instances. In the 1930's the United States imposed arms embargoes on some Latin American countries.

Financial boycott is a severance of financial relationships by states individually or collectively. It is designed to cut off supplies to another state by making it difficult or impossible for that state to purchase essential goods abroad after its own foreign exchange and gold have been exhausted.<sup>71</sup> A financial boycott includes the withholding of loans and credits, suspension of balances due, blocking of loans and credits, blocking and freezing of gold and other assets, forbidding the remittance of funds, and the sequestration of the property of the nationals of the state subject to the boycott. Financial measures such as these, together with full economic embargoes and other measures, are utilized particularly in time of war.

The international boycott is a modern form of reprisal whereby states, individually or collectively, completely interrupt all relationships with another state and its nationals.<sup>72</sup> Such a sanction was prescribed by Article XVI of the Covenant of the League of Nations for application to a state which "resorts to war in disregard of certain other provisions of the Covenant." By this Article all member states undertook "immediately to subject it to the severance of all trade and financial relations, the prohibition of all intercourse between their nationals, and the nationals of the covenant-breaking state, and the nationals of any other state, whether a member of the League or not." Presumably the sanction was not to cease upon the mere cessation of hostilities, but was to be continued until all illegal gain had been surrendered.

Some question exists as to the legality of a boycott which is directed against a state which has not committed an illegal act. Some authorities are of the opinion that under certain circumstances it could amount to an act of economic aggression which should be prohibited by law.<sup>73</sup>

---

<sup>70</sup> Royal Institute of International Affairs, *International Sanctions* 1 (1938).

<sup>71</sup> *Id.* at 76.

<sup>72</sup> *Id.* at 107; see Stone, *op. cit. supra* note 46, at 291.

<sup>73</sup> See Gould, *op. cit. supra* note 69, at 594; Stone, *op. cit. supra* note 46, at 291.



B. *Responses Available to Regional Arrangements and Agencies.*

Regional arrangements have been defined as "groupings of States established by treaty on the basis of geographical propinquity, provided with common organs, and aiming at cooperation and mutual assistance, in particular, in the political sphere."<sup>74</sup>

The Organization of American States (OAS)<sup>75</sup> constitutes such a regional arrangement. It is debatable, however, whether treaties of collective defense such as the Treaty of Brussels of March 17, 1948, and the North Atlantic Treaty of April 4, 1949, created regional arrangements within the meaning of the Charter, in that they are essentially treaties of collective defense and they neither require nor provide means for the peaceful settlement of disputes between their member states.<sup>76</sup> Logically there appears to be no reason why arrangements for defense purposes only should not, for the purposes of Article 51 of the Charter, be considered as regional arrangements under Articles 52 through 54 of the Charter.<sup>77</sup>

The OAS was established by a series of instruments<sup>78</sup> which state that it is a regional agency within the Charter's meaning. Furthermore, one of the purposes of the OAS is to fulfill regional obligations under the Charter of the U.N. which assigns to regional arrangements and agencies certain responsibilities for the pacific settlement of disputes and for the enforcement of the Charter.

Article 52 of the U.N. Charter specifies that nothing in the Charter "precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations." Article 33 of the Charter refers to regional arrangements as a means for the peaceful settlement of disputes to which members must first have recourse in the settlement of their disputes. Additionally, Article 52 specifies that members participating in such arrangements shall make every effort to achieve pacific settlement of local disputes through these bodies before they are referred to the Security Council for resolution. Under Article 53, the Security Council may, where appropriate, use regional arrangements or agencies for enforcement action under its authority. "Enforcement action" by such arrangements or agencies, however, may only be undertaken with the Security Council's

---

<sup>74</sup> 2 Oppenheim, *op. cit. supra* note 68, at 117.

<sup>75</sup> April 30, 1948, [1951] 2 U.S.T. & O.I.A. 2394, T.I.A.S. No. 2361.

<sup>76</sup> See 2 Oppenheim, *op. cit. supra* note 68, at 158-59; Stone, *op. cit. supra* note 46, at 247-51.

<sup>77</sup> Stone, *op. cit. supra* note 46, at 251.

<sup>78</sup> See note 82 *infra*.

authority. Article 54 specifies that the Security Council must be informed of all regional activities for the maintenance of peace and security.

The responses and sanctions which are available to the members of the OAS, individually or collectively, for the redress of alleged breaches of the Charter of the OAS, of other conventional arrangements to which they are parties, and of the rules and principles of customary international law, are those which have been discussed above.

The authority for individual and collective sanctions by members of the OAS in the maintenance of peace and the territorial integrity and political independence of the member states is derived in particular from the U.N. Charter,<sup>79</sup> the Charter of the OAS, and the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).<sup>80</sup> The legality of the particular response by a member state, or by member states of the OAS to a breach of an international obligation is, therefore, dependent upon its compatibility with the provisions of these conventional arrangements.

The Charter of the OAS provides the constitutional framework for the settlement of disputes between the parties in the OAS. It establishes, as well, the collective responsibility of the member states to maintain the peace and the territorial integrity and political independence of the member states. It is the Rio Treaty, however, in particular, which specifies the manner and the means by which the objectives of the Charter of the OAS are to be attained and insured.

### 1. Pacific Settlement of Disputes Under the Charter of the OAS.

Under Article 1 of the Charter of the OAS the member states are, under all circumstances, bound to refrain from intervening, directly or indirectly, in the internal and external affairs of other member states. The Charter, furthermore, precludes the "threat or the use of force" and "other means of coercion for the settlement of their controversies" and it obligates the member states "to have recourse at all times to pacific procedures."<sup>81</sup> In this respect, the Charter of the OAS binds the members to seek the settlement of their disputes by direct negotiations, good offices, mediation, inves-

---

<sup>79</sup> June 26, 1945, 59 Stat. 1031, T.S. No. 993.

<sup>80</sup> Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77.

<sup>81</sup> The text of Article I places greater limitations on the use of forcible or coercive action than does the Charter of the U.N. Its language can be taken to preclude all recourse to non-pacific measures of a forcible or coercive character except perhaps for the severance of diplomatic relations or recourse to mild forms of retaliation, reprisals, embargo or boycott but only after pacific methods of settlement have been attempted unsuccessfully. See Stone, *op. cit. supra* note 46, at 287.

tigation and conciliation, judicial settlement, arbitration, and any other pacific means which may have been agreed upon by the parties concerned.<sup>82</sup>

On the peaceful settlement of disputes, the Rio Treaty specifies that the parties in their international relations are not to resort to the threat or use of force in any manner inconsistent with its provisions or those of the Charter of the U.N. (Article 1); that they will make every endeavor to settle any such controversy by means of the procedures in force in the Inter-American System before they refer it to the General Assembly or the Security Council of the U.N. (Article 2); and that for the purpose of the Treaty "the measures on which the Organ of Consultation may agree will comprise one or more of the following: recall of chiefs of diplomatic missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, and radiotelephonic or radiotelegraphic communications . . ." (Article 8). This article also authorizes the use of armed force in the exercise of individual or collective self-defense recognized by Article 51 of the Charter of the U.N.

## 2. Coercive and Forcible Measures by the OAS in the Settlement of Disputes.

Articles 3 and 6 of the Rio Treaty obligate individual and collective action with respect to threats of aggression and armed attacks.

Article 6 provides:

if the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by

---

<sup>82</sup> See Charter of the OAS, *supra* note 75 (Articles 20 and 21). Treaties among the American States which set forth the specific means by which disputes are to be settled peacefully are: The Act of Chapultepec, March 8, 1945, 60 Stat. 1831, T.I.A.S. No. 1543; Treaty on Coordination, Extension and Fulfillment of Existing Treaties Between the American States, Dec. 23, 1936, 51 Stat. 116, T.S. No. 926; Treaty on Good Offices and Mediation, Dec. 23, 1936, 51 Stat. 90, T.S. No. 925; Treaty on Prevention of Controversies, Dec. 23, 1936, 51 Stat. 65, T.S. No. 924; Treaty on Non-Intervention, Dec. 23, 1936, 51 Stat. 41, T.S. No. 923; Treaty on Maintenance, Preservation, and Reestablishment of Peace, Dec. 23, 1936, 51 Stat. 15, T.S. No. 922; Treaty on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881; Anti-War, Nonaggression and Conciliation Treaty, Oct. 10, 1933, 49 Stat. 3363, T.S. No. 906; Treaty on Inter-American Arbitration, Jan. 5, 1929, 49 Stat. 3153, T.S. No. 886; Treaty on Inter-American Conciliation, Jan. 5, 1929, 46 Stat. 2209, T.S. No. 780; Treaty on Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, 46 Stat. 2749, T.S. No. 814; Treaty to Avoid or Prevent Conflicts Between the American States, May 3, 1923, 44 Stat. 2527, T.S. No. 752; Treaty on Establishment of International Commission of Inquiry, Feb. 7, 1923, 44 Stat. 2070, T.S. No. 717.

an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression, or in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

Article 3 provides:

1, The High Contracting Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said Contracting Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations. . . .

3, The provisions of this Article shall be applied in case of any armed attack which takes place within the region described in Article 4 or within the territory of an American State. When the attack takes place outside of the said areas, the provisions of Article 6 shall be applied.

4, Measures of self-defense provided for under this Article may be taken until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.

The Rio Treaty further provides in Article 7 that:

In the case of a conflict between two or more American States, without prejudice to the right of self-defense in conformity with Article 51 of the Charter of the United Nations, the High Contracting Parties, meeting in consultation shall call upon the contending States to suspend hostilities and restore matters to the *status quo ante bellum*, and shall take in addition all other necessary measures to reestablish or maintain inter-American peace and security and for the solution of the conflict by peaceful means. The rejection of the pacifying action will be considered in the determination of the aggressor and in the application of the measures which the consultative meeting may agree upon.

The OAS has, in most instances where the provisions of the Rio Treaty were applicable, sought a solution through other than forcible measures. Since 1947, there have been some ten cases in which the OAS, through its Organ of Consultation or its provisional Organ of Consultation—the council of the OAS—has taken or has considered taking collective action to enforce the obligations assumed by the member states under the Charter of the OAS and the Rio Treaty. In all but three cases, peaceful action only was taken to rectify breaches of international law and to restore the

peace. The peaceful action taken in these instances was of a conciliatory nature, consisting either of the appointment of fact-finding committees or committees of inquiry, the appointment of observation or surveillance committees to ascertain whether the recommendations of the provisional Organ of Consultation of the OAS were being carried out, or the imposition of admonitions or censure. In the three remaining cases the action taken was coercive and forcible in nature. In one—the Venezuelan-Dominican Republic dispute of 1960—the OAS resolved to rupture diplomatic relations with the Dominican Republic and, as well, partially to interrupt economic relations with it. In the second—the Cuban political situation in 1962—the OAS suspended Cuba from participation in the inter-American system and suspended all trade in arms and implements of war with Cuba. In the third—the Cuban missile crisis—it authorized the taking of all measures, individual or collective, including armed force, to insure that Cuba would not continue to receive from the Soviet bloc military materials which could threaten the peace and security of the continent.

The Rio Treaty specifies in Article 5 that the members shall, in conformity with Articles 51 and 54 of the Charter of the United Nations, “immediately send to the Security Council of the United Nations, complete information concerning the activities undertaken or in contemplation in the exercise of the right of self-defense or for the purposes of maintaining inter-American peace and security.” And Article 10 provides that none of the provisions of the Treaty are to be “construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations.”

In the light of the foregoing it would appear that the Charter contemplated that action taken by the OAS and other regional arrangements and agencies for the purpose of maintaining international peace and security would be consistent with the overall purposes and the principles of the U.N. Charter. Thus, assuming that the Security Council can act effectively, it is the Security Council and not the OAS which is to bear the primary responsibility for insuring the peace. Therefore, it is for the Security Council, not the regional arrangement or agency which is exercising the right of self-defense, to decide whether measures necessary and sufficient for the maintenance of peace and security have been taken. Furthermore, the determination whether regional action allegedly taken in self-defense was justifiable under the circumstances is one which rests solely with the Security Council.<sup>83</sup> Under this view states

---

<sup>83</sup> The constitutionality of regional arrangements for collective self-defense depends on their conformity with Article 51 of the U.N. Charter. See Falk, *op. cit. supra* note 54, at 243; Kelsen, *The Law of the United Nations* 918 (1950); Thomas & Thomas, *op. cit. supra* note 57, at 160-86.

operating under a regional arrangement do not have the right under the Charter to determine the legality of actions taken by them, allegedly in self-defense. They are considered to have only the right to decide in the first instance whether they are the object of an armed attack which requires armed resistance.<sup>84</sup> This position is premised upon the concept that the right of self-defense, if it is not to become an excuse for lawlessness, must necessarily be the subject of review and control by superior authority. The proponents of this view assert—properly, it is believed—that Article 51 of the Charter vests in the Security Council such a superior authority.

Although the purposes and objectives which were originally visualized by the U.N. Charter may not have been attained—in part because of the voting requirements in the Security Council—the principles and purposes of the Charter have nevertheless been infused into the regional and self-defense arrangements which it authorized and fostered.

In this respect Claude has observed that, although the OAS has been able to establish a monopolistic jurisdiction over disputes in its region, the Security Council itself has never attained the capacity to regulate or control the enforcement operations of the OAS. Members of regional agencies have an interest in evading control by the Security Council and it is highly improbable that the Council will be able in the foreseeable future to exercise any effective superior authority over regional agencies. In fact it is obvious that in an era of cold war, regional organizations provide the great powers with an important political weapon. They will not permit this weapon to be checkmated by the United Nations.<sup>85</sup>

C. *Responses Which Are Available to the United Nations.*

The manner in which states are required to settle their disputes and the limited extent to which they are authorized to have recourse to armed force under the U.N. Charter has been discussed in some detail. The discussion which follows, therefore, will consider the variety of measures and procedures which are available to the U.N. under the Charter in the peaceful or forcible settlement of disputes which endanger the international peace and security. The vast potential of the U.N. for these purposes has not been fully recognized, much less realized. To date very little ingenuity has been displayed in developing or fostering the latent capabilities of the U.N. for effective preventive action in the settlement of international disputes.

---

<sup>84</sup> 2 Oppenheim, *op. cit. supra* note 68, at 159.

<sup>85</sup> Claude, "The OAS, the UN and the United States," 547 Int'l Conc. 63 (March 1964).

### 1. Pacific Settlement of Disputes.

Article 33 of the Charter requires that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Should these measures prove ineffectual, Article 37 binds the parties to refer the dispute to the Security Council. The parties to an international dispute may bring a dispute or any situation which might lead to international friction or give rise to a dispute to the attention of either the Security Council or the General Assembly. A non-member state has the same right, if it accepts in advance for the purpose of the dispute the obligation of pacific settlement specified in the Charter. The proceedings of the General Assembly on matters of this nature which have been brought to its attention, however, are subject to the provisions of Articles 11 and 12 of the Charter.

#### a. *The Security Council.*

The Security Council is empowered under Article 43 to investigate "any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." Should the investigation disclose that the dispute or situation is likely to endanger the international peace and security, the Security Council may then have recourse to the measures specified in Articles 33 and 36 through 43 of the Charter.

The Security Council may, under Article 36, "at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment" taking into "consideration any procedures for the settlement of the dispute which have already been adopted by the parties." In making recommendations under this article, the Security Council is to "take into consideration that legal disputes should as a general rule be referred . . . to the International Court of Justice in accordance with the provisions of the Statute of the Court."

As to disputes of the nature mentioned in Article 33, which the parties have been unable to settle by the peaceful means specified in that article, the Security Council must "decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."

Under Article 38, the Security Council may also, upon the request of the disputing parties, make recommendations with a

view to pacific settlement of their dispute. Under Articles 39, 41, and 42, the Security Council may have recourse to the coercive and forcible measures which are authorized by Articles 41 and 42 of the Charter.

In addition to its authorization under Articles 33-38 of the Charter for the settlement of disputes, the Security Council has available to it as well, the broad powers specified in Article 24 of the Charter. This article provides:

1. In order to ensure prompt and effective action by the UN, its members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

b. *The General Assembly.*

The General Assembly is also authorized (by Article 10) to discuss "any question or any matter within the scope of the Charter or relating to the powers and functions of any organ provided for in the . . . Charter, and except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both." Under Article 11, "any such question on which action is necessary may be referred to the Security Council by the General Assembly either before or after discussion." Article 11 also provides that the General Assembly may "call the attention of the Security Council to situations which are likely to endanger international peace and security."

Article 12 limits the authority granted to the General Assembly by Articles 10 and 11. It specifies that the General Assembly shall make no recommendations on any dispute or situation which is likely to endanger international peace and security while the Security Council is exercising the primary functions which are assigned to it by the Charter with respect to such dispute or situation unless the Council so requests.

Under the authority contained in Articles 10 and 11 of the Charter, the General Assembly in 1950 adopted the Uniting for Peace Resolution<sup>86</sup> which, in part, rectifies the impotency of the U.N. which results from the unanimity which the Charter requires in the voting of the permanent members of the Security Council

---

<sup>86</sup> *Supra* note 53.



on matters pertaining to the maintenance and enforcement of international peace and security. The Uniting for Peace Resolution provides, that

if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibilities for the maintenance of international peace and security in any case where there appears to be a threat to peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with the view of making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or acts of aggression, the use of armed force when necessary, to maintain or restore international peace and security. If not in session at the time, the General Assembly may meet in emergency special session within twenty-four hours of the request therefor. Such emergency special session may be called if requested by the Security Council on the vote of any seven members, or by a majority of the members of the United Nations.

In the same resolution, the General Assembly established a Peace Observation Commission and a Collective Measures Committee to study and report on methods to maintain and strengthen international peace and security, taking account of collective self-defense and regional arrangements under Articles 51 and 52. The Resolution was directed to cases in which the Security Council had failed to deal effectively with a situation or dispute and in which, therefore, that body could no longer be deemed to be exercising its primary functions with respect to them under Article 12 of the U.N. Charter. This Resolution, which provides only for recommendations which are not binding on the members, is compatible with the objective of the Charter: the enforcement of peace. As such, the Resolution and the recommendations made under it are actions which the General Assembly may properly take under the Charter of the U.N.

Although the General Assembly plays an important role in the settlement of disputes under the U.N. Charter, it is nevertheless the Security Council which has the dominant role and is the principal agency of the U.N. in the settlement of disputes.

c. *The Authority of the Security Council.*

(1) *Investigation.*

As noted above, the Security Council under Article 34 may of its own accord investigate and discuss any dispute or situation to determine whether its continuation is likely to endanger international peace and security. The power of the Security Council to investigate disputes and situations may be utilized to make recom-

mendations under Article 36 and to determine the existence of situations calling for enforcement action under the Charter or under Article 33(2) which specifies that the Security Council shall, when it deems necessary, call upon the parties to settle their dispute by one of the means specified in that article or under Article 37 after the parties have failed to settle their dispute by one of the means enumerated in the Charter. The Security Council may exercise its investigation authority at any stage of a dispute—before the parties have attempted a method or methods of settlement specified in Article 33, or even before a dispute has arisen.

The Security Council on numerous occasions has appointed commissions of inquiry and investigation. A Security Council Commission under Article 34 was established in 1946 to ascertain the facts of an alleged violation of the frontier between Greece, Albania, Bulgaria, and Yugoslavia.<sup>87</sup>

The Peace Observation Commission (POC) which was proposed by the United States and established under the 1950 Uniting for Peace Resolution was designed, as noted above, to "observe and report on the situation in any area where there exists international tension, the continuance of which is likely to endanger the maintenance of international peace and security." Recourse to the vast potential of a POC in the maintenance of peace has to date been only minimal. In fact the POC has been resorted to only once, at the suggestion of Greece, when it undertook to observe the frontiers between Greece, Albania, Bulgaria, and Yugoslavia as the successor to the Special Security Council Committee on the Balkans which had been established in 1946 to ascertain the facts of alleged border violations. In other instances in which recourse to a POC was requested or might have proved profitable, its use was either vetoed or discouraged. In 1954 when Thailand brought the Indo-chinese situation to the attention of the Security Council, it requested the establishment of a POC subcommittee and the presence of observers in the area. This proposal was vetoed by the Soviet Union.<sup>88</sup> The United States discouraged the use of a POC in Burma in 1954, with respect to the alleged improper activities of Chinese Nationalist elements on Burma's northern frontiers. Since that time, no serious efforts have been made to utilize the services of the POC.<sup>89</sup>

The POC provides a versatile mechanism which the U.N. could utilize to exercise an effective and restraining influence on

---

<sup>87</sup> 2 Oppenheim, *op. cit. supra* note 68, at 104-05.

<sup>88</sup> Bloomfield, *The United Nations and U.S. Foreign Policy* 147 (1960).

<sup>89</sup> *Id.* at 148.

disputants in areas where there exist international tensions "likely to endanger the maintenance of . . . peace and security" and through which the U.N. could receive unbiased reports, based on observation, as to the illegal and belligerent activities of the disputants. The Korean conflict clearly reflected the potential of a POC in these respects. The report of the U.N. Commission for Korea at the commencement of the conflict in 1950 left no doubt that the attack had been commenced by the North Koreans, because this Committee, present in Korea to use its good offices to effectuate the unification of Korea, was on the scene at the time of the attack. Its report, submitted in the name of a neutral, the Indian chairman, fully established the authenticity of the United States' charge that the North Koreans had launched an armed attack.

(2) *Good Offices, Conciliation, and Mediation.*

The Security Council, under Article 24, may assume conciliatory or mediation functions in disputes. It may undertake such action itself or through individuals or commissions appointed by it. In 1947, it appointed a Committee of Good Offices to assist in resolving a dispute in Indonesia. In 1948 it appointed first a mediator and then a Commission of Conciliation to assist in resolving the Palestine dispute. Again in 1948, it established a Commission of Investigation and Mediation to resolve the Kashmir dispute between India and Pakistan. These instances and the action of the U.N. in Lebanon and the Suez indicate that a U.N. presence in disputes, either through good offices, mediation, consultation, investigation, and inquiry, or by means of a cease-fire and the presence of a U.N. military force, permits a U.N. takeover of the dispute and application thereto of the U.N. Charter rules for the peaceful settlement of controversies. More important, it makes the intervention by the great powers in disputes difficult, if not impossible.<sup>90</sup> The application by the U.N. of deterrent measures not involving the use of armed force in disputes between the lesser powers has generally been successful in insulating the disputants from the political influences and objectives of the great powers, particularly when contingents of non-fighting U.N. troops have been dispatched to areas where contention or conflict existed—for example, the Sinai peninsula, the Gaza strip, Lebanon, and the Congo. The importance of a U.N. presence in crises which could involve the great powers was forcefully demonstrated during the Suez controversy by the presence of a non-fighting U.N. force which contained no military units of the great powers, the presence of the U.N.

---

<sup>90</sup> *Id.* at 67.

Truce Supervisory Organization, and the activities of the U.N. Secretary General.<sup>91</sup>

(3) *Recommendations on Terms of Settlement.*

Under Article 36, the Security Council may recommend procedures or methods for the settlement of disputes at any stage or in any situation which is likely to endanger international peace, whether the dispute is brought before it by the parties under Article 33 or 35. Furthermore, the parties to a dispute are bound to submit it to the Security Council if they have failed to settle it under Article 37. In this event, the Security Council must decide whether to recommend procedures of settlement or terms of settlement. Until the Security Council sees fit to decree compulsive measures in the settlement of disputes under Chapter VII of the Charter, its pronouncement on the settlement of disputes, either procedural or substantive, have only moral and political effectiveness. The Security Council, by resolution of December 24, 1948, called upon the governments of Holland and Indonesia to cease hostilities, and upon Holland to release the Indonesian President and political prisoners. In a resolution of January 28, 1949, it called upon the Dutch government to discontinue its military operations and to release all political prisoners immediately. In another resolution it called upon Indonesia to desist from guerilla warfare. Neither the Security Council nor the General Assembly has the power, under the Charter, to direct that these disputants adopt or desist from a line of conduct in the peaceful settlement of their dispute in the absence of "enforcement" action under Chapter VII of the Charter.<sup>92</sup>

(4) *The Imposition and Enforcement of Measures Taken.*

The power of the Security Council to have recourse to measures of compulsion (Article 39) is dependent upon a prior determination by the Council that there exists a "threat to the peace, or act of aggression." Under this article the Security Council may simultaneously have recourse to both conciliatory and enforcement action. An important instance of recourse to Article 39 was the Security Council declaration after the invasion of South Korea in 1950<sup>93</sup> that the action of North Korea constituted a breach of the peace; its call upon North Korea to "cease hostilities forthwith" and to withdraw its troops to the frontier; and its call upon the U.N. members to render every assistance in the execution of that Resolution. When North Korea failed to comply with this Resolu-

<sup>91</sup> *Id.* at 44, 47.

<sup>92</sup> 2 Oppenheim, *op. cit. supra* note 68, at 108-09.

<sup>93</sup> Resolution of June 25, 1950 (Doc. S/1501).

tion, the Security Council issued another<sup>94</sup> which recommended that the members of the U.N. "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security." Although the Security Council could have directed this action rather than recommending it, by recommending this action the Council made it possible for the members of the U.N. to indicate their uniform support of the Security Council.

Enforcement action under the Charter may be taken against both member and non-member states. Article 39 refers to any threat to the peace, and important enforcement action thereunder has been taken against non-member states, e.g., the dispute between Holland and Indonesia in 1947; the United Kingdom-Palestine dispute in 1948; and the Korean action.<sup>95</sup>

Under Article 40 of the Charter, the Security Council is also empowered to call upon the parties concerned to comply with such provisional measures as "it deems necessary or desirable" before it makes any recommendations or orders measures of enforcement. The Council, it will be remembered, took provisional measures in the Palestine dispute.<sup>96</sup>

At the present time, when collective security cannot be fully insured through U.N. military action and the great powers are each capable of massive and devastating retaliation even after a first strike by another power, the political, rather than the military, role of the U.N. provides the means by which world peace and the peaceful settlement of disputes can be insured.<sup>97</sup> It is this aspect of the U.N., therefore, which must be emphasized and made more effective.

d. *The Authority of the General Assembly.*

The General Assembly has wider latitude with respect to the settlement of disputes than has the Security Council. Its jurisdiction over disputes or situations which might lead to friction or disputes is co-extensive with that of the Security Council, except that it may not make any recommendations to the members on these matters while the Security Council is exercising its primary functions with respect to them.

Under Article 11(2) the General Assembly may discuss any question relating to the maintenance of international peace and security which is brought before it and, subject to the limitation

---

<sup>94</sup> Resolution of June 27, 1950 (Doc. S/1511).

<sup>95</sup> 2 Oppenheim, *op. cit. supra* note 68, at 164-65.

<sup>96</sup> *Id.* at 166-67.

<sup>97</sup> Bloomfield, *op. cit. supra* note 88, at 46.

contained in Article 12, may make recommendations with regard to such question either to the states concerned or to the Security Council. Under Article 10 the General Assembly may discuss any question or matter within the scope of the Charter, subject again, however, to the limitation contained in Article 12. As to all of these matters, the General Assembly may conduct investigations and it may set up temporary or permanent bodies for this purpose. The General Assembly's authority flows from its power to discuss and make recommendations on questions, disputes, and situations which might lead to international friction or give rise to disputes. The General Assembly, like the Security Council, may, when acting under Article 35, make recommendations as to both the method and the terms of settlement. The important cases on which the General Assembly has made fruitful recommendations include the question of the independence of Korea, the threats to the political independence and the territorial integrity of Greece, and the dispute between India and South Africa concerning the treatment of Indians in South Africa.<sup>98</sup>

## 2. Coercive and Forcible Measures by the U.N.

The Charter of the U.N. provides for two coercive means of settling international disputes and situations which constitute a threat to the peace, a breach of the peace, or an act of aggression. One provides for coercive measures not involving the use of armed force, the other for the use of armed force.

Article 41 provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42 provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

---

<sup>98</sup> 2 Oppenheim, *op. cit. supra* note 68, at 111.

In implementation of this article, Article 43 provides that

the Members of the United Nations, are to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. . . .

Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

To date, political difficulties have precluded the conclusion of the agreements envisaged by Article 43. This situation, however, was anticipated, for Article 106 of the Charter provides that pending the coming into force of the special agreements contemplated by Article 43, the five permanent members of the Security Council shall consult with one another and with other members of the U.N. with a view to such joint action on behalf of the U.N. as may be deemed necessary by the Security Council for it to begin the exercise of its responsibility under Article 42, for the maintenance of international peace and security. The conclusion of special agreements by all members of the U.N. is not, therefore, an essential condition precedent for the assumption by the Security Council of responsibilities under Article 42. As a practical matter, however, conclusion of some such agreements is necessary for that purpose.<sup>99</sup>

Although Articles 42 and 43 create the possibility of an independent international armed force under the direction of the Security Council, such a system has not, and in all probability, will not, be adopted in the foreseeable future. In lieu thereof national contingents under international direction have uniformly been utilized. This was the system employed by the U.N. in the Korean conflict in 1950, in the Suez crisis of 1956, in the Congo in 1963, and in Cyprus in 1964.<sup>100</sup>

### 3. Limitations on the Power and Functions of the U.N.

The power of the U.N. in the settlement of disputes is not unlimited. Its authority does not extend to matters which are

<sup>99</sup> *Id.* at 169-71.

<sup>100</sup> See Lauterpacht, *The United Nations Emergency Force* (Basic Documents), *Int'l & Comp. L.Q.* (Spec. Supp. 1960).

essentially within the domestic jurisdiction of a state. To this end Article 2(7) of the Charter provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

These provisions have been the subject of much discussion and have elicited various opinions as to their intent and scope of applicability. It would seem that although states are not required under this article to submit matters which they consider to be matters essentially within their domestic jurisdiction—matters which international law considers proper for determination by domestic legislation only—matters of this nature which give rise to a dispute or situation which is “likely to endanger the maintenance of international peace and security” thereupon cease to be matters which are essentially within the domestic jurisdiction of a state. These matters then become matters of international concern to which the provisions of Chapters VI and VII of the Charter relative to the settlement of disputes apply. The provisions of Article 2(7) of the Charter do not negate the authority of the U.N. to settle in the manner provided by the Charter a dispute which has become a matter of international concern. As Oppenheim has observed, in practically every instance of a dispute or situation brought before the Security Council, the provisions of Article 2(7) have been invoked as a bar to the jurisdiction of the U.N. and in “most of these cases, the plea has been disregarded on the ground either that the matter was essentially international . . . or that the action to be undertaken by the Security Council or the General Assembly did not amount to intervention (it being confined to discussion, investigation, and recommendation), or on both grounds.”<sup>101</sup>

The U.N. offers a myriad of institutional means, both flexible and impartial, for the accomplishment of peaceful change, the peaceful settlement of disputes, and the maintenance of international peace and security, which no regional or other collective defense organization can provide.<sup>102</sup> The vast reservoir of diplomatic methods and techniques which is available to the U.N. for the

---

<sup>101</sup> 2 Oppenheim, *op. cit. supra* note 68, at 115-17. See Kelsen, *The Law of the United Nations*, 769-91 (1950); 1 Oppenheim, *International Law* 414-20 (8th ed. Lauterpacht 1955); Kelsen, “Limitations on the Functions of the United Nations,” 55 *Yale L. J.* 997 (1946).

<sup>102</sup> Bloomfield, *op. cit. supra* note 88, at 143.



maintenance of peace, furthermore, remains unexplored and undeveloped. It is anticipated that the immediate future will see a perfection within the U.N. of new forms and methods of deliberation and techniques of reconciliation which the unique problems of the era will require.<sup>103</sup> Although the U.N. has to date on the whole been ineffective in resolving serious disputes between the great powers either by recourse, or the threat to have recourse, to coercive measures under Articles 41 and 42 of the Charter, it has, by providing the disputants a forum for discussion and an impartial agency for the resolution of their controversies, effectively deterred the forcible settlement of many disputes.<sup>104</sup>

Dag Hammarskjöld, then Secretary General, in his thirteenth Annual Report to the U.N. stated that the U.N. "as an instrument for reconciliation and for world-wide cooperation . . . represents a necessary addition to the traditional methods of diplomacy as exercised on a bilateral or regional basis."<sup>105</sup> The U.N. with its well established procedures provides a diplomatic instrument which is immediately available to all members at all times. If disputing states desire to avoid the formal procedures of the U.N. they may instead have recourse immediately to the traditional methods of diplomacy, for most members maintain permanent missions at the U.N. Additionally, they may have recourse to both formal U.N. conference (public) diplomacy and traditional diplomacy.<sup>106</sup> The U.N. is both a forum for diplomatic discussions and a diplomatic instrument which facilitates, fosters, and insures the continuation of negotiations—public, private, or both.

It is clear from the history of the U.N. that a U.N. presence, either in the form of POC personnel, non-fighting international forces, observers, committees of investigation and inquiry, or through the good offices, mediation, and consultation of the U.N., is the most effective catalyst now available to the world community in the sphere of preventive peace and the deterrence of indirect aggression through subversion.<sup>107</sup> The potency of the U.N. in these spheres rests in the ability of any nation to bring before it any dispute, situation, or belligerent act which poses or could pose a threat to international peace and security, and the fact that the disputants must not only publicly defend their positions before

---

<sup>103</sup> See statement made by Secretary General Hammarskjöld in his tenth Annual Report to the United Nations, cited in Hovet, "United Nations Diplomacy," XVII J. Int'l Aff. No. 1, at 30 (1963).

<sup>104</sup> Bloomfield, *op. cit. supra* note 88, at 43.

<sup>105</sup> United Nations Annual Report of the Secretary General, 1957-58.

<sup>106</sup> See Hovet, *supra* note 103, at 30.

<sup>107</sup> See Gross, "UN Record and UN Dilemma," N. Y. Times, Sept. 21, 1958, p. 69 (Magazine).

the U.N., but must also withstand the pressure of that organization and that of world public opinion which has been organized and developed by discussions before it, that they settle their disputes peacefully.<sup>108</sup> That the U.N. provides an effective instrumentality for organizing and publicizing the disapprobation of the world community toward an unjustifiable recourse to forcible or coercive<sup>109</sup> measures in the settlement of disputes was forcibly demonstrated by the action taken in the U.N. at the time of the Korean conflict in 1950.

In conclusion, the U.N. possesses an unusual potential for peace. It provides an important medium for the development of plans for the negotiation of arms control and disarmament agreements. These matters, including the nuclear problem, are, of course, multilateral ones and the U.N., a neutral, impartial, and universal organization, is logically the one in which agreements on these matters should be developed and concluded. Only the U.N. is in a position to place strong pressure on the nuclear powers to come to an agreement which is adequate for the peace and security of the world community.<sup>110</sup>

---

<sup>108</sup> See Hovet, *supra* note 103, at 31.

<sup>109</sup> Gross, *supra* note 107, at 54.

<sup>110</sup> Bloomfield, *op. cit. supra* note 88, at 94-95.